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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1997

KUMHO TIRE CO., LTD., ET AL.,

Petitioner,

v.

PATRICK CARMICHAEL, ETC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ATTORNEYS INFORMATION EXCHANGE GROUP, INC., IN SUPPORT OF RESPONDENTS AND IN FAVOR OF AFFIRMANCE

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QUESTIONS PRESENTED

I. Whether the factors identified in *Daubert* [testing, peer review, error rate, standards and controls, general acceptance] were intended to be the criteria by which the reliability of every expert witness is judged; or whether, instead, reliability should be judged according to the methodologies and criteria used by experts in their particular fields.

II. Whether the Court should use its opinion in this case to establish some procedural guidelines for litigants and trial courts to follow in regard to "*Daubert* challenges" to admissibility of expert testimony: e.g., that the challenging party has the burden to make a timely challenge in a precise and clear manner.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Attorney's Information Exchange Group, Inc. ("AIEG"), is a not-for-profit organization with its corporate headquarters in Birmingham, Alabama. AIEG's membership consists of trial lawyers throughout the United States who represent plaintiffs in litigation involving defects in the design of mechanical products. The purposes of the organization are recited in its Bylaws as follows:

> The Corporation was founded for the following purposes: (i) to assist Member Attorneys handling similar cases to properly prepare and fairly resolve product defect cases; (ii) to reduce the time and expense required to properly prepare and fairly resolve product defect cases; (iii) to offset the inherent advantages favoring defendants in defective product litigation; and (iv) to overcome the obstacles which unjustly impede the victims of defective products in the exercise of their right to seek legal redress.
>
> The Corporation intends to achieve its purposes by organizing and administering plaintiff litigation support groups each consisting of plaintiff attorneys handling similar defective product cases involving common legal and factual issues, the same technical materials and information, and the identical strategic considerations. Providing Member Attorneys with access to the ac-

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[1] Pursuant to Supreme Court Rule 37.6, AIEG states that no counsel for either party authored this brief in whole or in part, and that no one other than AIEG made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, both parties have granted blanket consent to the filing of *amicus curiae* briefs supporting either party and letters from the parties so consenting have been filed with the Clerk of the Court.

> tivities associated with litigation support groups will aid Member Attorneys in their own case preparation activities and facilitate the desire of Member Attorneys handling similar cases to participate in a cooperative effort to achieve the common interest of properly preparing and fairly resolving individual cases.

AIEG Bylaws Article I

AIEG currently administers twelve litigation support groups, each dealing with a design defect in a mechanical product that is currently the subject matter of individual product liability cases pending in various state and federal courts throughout the United States.

SUMMARY OF THE ARGUMENT

The appropriate issue in this case is not simply "whether *Daubert* applies to all kinds of expert testimony." This amicus concedes that Fed. R. Evid. 702 requires district courts to determine the sufficient reliability of expert testimony as a prerequisite to admissibility (assuming the challenging party first demonstrates the existence of a genuine issue of reliability). Thus, the real question, and the one that has divided the lower courts, is: what tests, factors, standards, or criteria does the trial judge apply to the proposed expert testimony in order to determine its level of reliability?

The position taken by the Petitioners and their amici is much too rigid and unnecessarily demanding. The five factors [many courts and authors group them as <u>four</u> factors] suggested in *Daubert*, a case concerning novel scientific evidence, do not "fit" with expert testimony that is not based on "pure" science. Attempts to utilize the *Daubert* factors as the criteria upon which to test the reliability of expert testimony from engineers, accountants, police officers, etc., are illogical, unworkable, and unfair.

Those parties who advocate the across-the-board use of the *Daubert* factors as the test for <u>all</u> kinds of expert testimony are distorting an evidentiary/procedural principle in an attempt to "close the courthouse door" on a great number of perfectly legitimate civil actions.

AIEG advocates the position taken by many lower courts: the appropriate criteria for testing reliability is the criteria used in the real-world practice of that particular profession or field of expertise. Courts should not require more of an expert witness than that witness's particular profession requires. If a particular methodology is commonly utilized in profession "X" to make real-world, everyday decisions in the "X" field of expertise, an expert witness who utilizes that method is "reliable" enough to testify in court. The *Daubert* factors of testing, peer review, and known error rate are not the exclusive method of establishing reliability in all professions. This case provides the Court with an opportunity to re-emphasize and clarify what it already said in *Daubert*: the five factors are non-exclusive and flexible, and are not relevant or appropriate to every field of expertise.

This case also provides the Court with an opportunity to address, at least in a general way, certain procedural aspects of "*Daubert* challenges." It is wasteful and unnecessary to require trial courts to conduct a full-blown "*Daubert* inquiry" in every case. The challenging party should first have the burden of demonstrating the existence of a specific reliability issue. That challenge should be required to be made as soon as the challenging party can reasonably articulate its grounds — otherwise, a successful challenge made for the first time at trial, or at a motion for summary judgment on the eve of trial and after the close of discovery, works to unfairly rob the proponent of a chance to cure the deficiency or to engage new experts.

ARGUMENT

I. EXPERT TESTIMONY IS "RELIABLE" IF THE WITNESS UTILIZES METHODS COMMONLY USED IN THAT PARTICULAR FIELD OF EXPERTISE.

Rules 702 and 703 of the Federal Rules of Evidence are "premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) (emphasis added). The particular discipline at issue in *Daubert* was "scientific knowledge," within the meaning of Rule 702: i.e., human epidemiology regarding Bendectin and birth defects. Thus, footnote 8 at 590, of the *Daubert* opinion explained: "Our discussion is limited to the scientific context because that is the nature of the expertise offered here." *Daubert* did not attempt to define what tests of reliability might be appropriate in other kinds of cases. Even as to purely "scientific" testimony, the *Daubert* majority plainly stated that the five factors (testing, peer review, error rate, standards and controls, general acceptance) were "general observations" and not "a definitive checklist." 509 U.S. at 593.

The problem is that too many courts have, in actual fact, rigidly applied the five *Daubert* factors to every kind of expert testimony. This has resulted in many illogical and unjust results. Too often, courts have excluded testimony, although the expert purported to apply methodologies that are well-accepted and utilized every day in the witness's particular profession or field. This unfair, unintended, and rigid application of the *Daubert* factors is exactly the position advocated by many of the Petitioners' amici.[2]

[2] See, as examples: the National Academy of Engineers brief at 3-4 ("The various *Daubert* factors for assessing the reliability of scientific

If a party challenges an opponent's expert witness and demonstrates that genuine questions exist regarding the witness's reliability, it is appropriate for the trial court to perform a "gatekeeper" function and to determine whether the proposed testimony is sufficiently reliable. When novel scientific theories are in issue, the *Daubert* factors are an appropriate test of reliability. But, the *Daubert* factors are useful and appropriate only because those are the standards utilized by real-world scientists in their day-to-day work — not because those five factors were invented out of the minds of the Supreme Court Justices as a matter of legal theory.

Conversely, when the challenged expert is not offering novel or "pure" scientific theory, the legal test of reliability should be drawn from what persons in that field of expertise actually do in their real-world professional lives. There is no single legal theory for testing the reliability of every conceivable form of expert testimony. The range of possible expert testimony is as broad as the human experience. Courts of law, as a matter of legal theory, are not in the business of telling professionals, experts, and experienced workers how to go about making necessary everyday decisions in their particular field of endeavor. If a physician normally relies on the "XYZ" method in making day-to-day diagnoses and treatment plans for pa-

testimony apply squarely to such engineering testimony. . . . *Daubert* [provides] a single conceptual framework to guide the admissibility of all expert testimony."); the American Tort Reform Association brief, at 6 ("The language and policy of Rule 702 require that a *Daubert*-type analysis apply to technical testimony."); the Product Liability Advisory Council brief, at 24 ("The application of the *Daubert* factors to all types of expert testimony is consistent with this Court's approach. . . ."); the Rubber Manufacturers brief, at 10 ("Rule 702 does not . . . require separate lists of factors for different kinds of experts."); and the Defense Research Institute brief, at 18. Petitioners' brief, e.g., at 19, 35, 40-44, asserts that the *Daubert* factors apply to virtually all kinds of experts.

tients, then an expert witness physician is "reliable" enough to testify in court to an opinion based on the "XYZ" method — even if that method might fail a district judge's understanding of the level of testing, peer review, and error rate knowledge necessary for the admission of novel or purely scientific testimony.

The core concept advocated by AIEG is that the particular profession at issue teaches the court what the relevant factors of reliability are. A court does not impose an a priori set of factors on the subject profession. This core concept is embodied in the proposed amendments to Fed. R. Evid. 702, approved in June 1998 by the Committee on Rules of Practice and Procedure of the United States Judicial Conference. The Reporter of the Committee, Fordham professor Daniel J. Capra, explains that:

> The proposed amendment to Rule 702 . . . applies to testimony by any expert [but] the relevant factors for determining reliability will vary from expertise to expertise. . . . If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. If the witness is relying solely or primarily on experience, then under the amendment the witness must explain how that experience leads to the conclusion reached.

Daniel J. Capra, *Evidence: Amendments*, Nat'l L. J. B11 (Oct. 5, 1998) (emphasis added). Prof. Capra noted that "courts have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. . . . Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the specific *Daubert* factors can be applied readily to the testimony of experts who are not scientists." Id.

This core concept is also advocated by Creighton professor G. Michael Fenner, who is the former chair of the Evidence Section of the American Association of Law Schools. See. G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939, 1009-10 (1996):

> What factors should the court consider at its *Daubert* hearing? The answer will sometimes be found by asking what factors do the specialists consider in their day-to-day practice of the specialty in question?
>
> . . .
>
> The lesson seems to be this: after *Daubert*, if a methodology is good enough for the day-in and day-out practice of the diagnosing physician, then it is still good enough for the courts, still good enough to satisfy the keeper of the expert-evidence gate.
>
> But the touchstone is whether it is considered good enough by experts in the field, rather than just by the expert who is the treating physician.

A prominent defense lawyer who "regularly represents defendants in toxic tort cases," also recognizes an essential element of this amicus's argument:

> The four nonexclusive factors identified in *Daubert* simply do not work as assessment tools for certain categories of expert testimony. Those factors were crafted with the scientific process in mind and contribute little to an analysis of the reliability of some opinions.

Stephen J. Imbriglia, *Supreme Court To Consider Application of Daubert To 'Nonscientific' Testimony*, Mealey's Daubert Report 14, 14, 16 (July 1998).

AIEG substantially agrees with the writings of another prominent defense lawyer, Jonathan M. Hoffman, who is also a contributing author to Bert Black and Patrick W. Lee, eds., EXPERT EVIDENCE: A PRACTITIONER'S GUIDE OF LAW, SCIENCE, AND THE FJC MANUAL (1997). See Jonathan M. Hoffman, *Analysis & Perspective: Expert Evidence*, 26(3) BNA Product Safety & Liability Reporter 733, 733, 737-38, 742 (July 31, 1998) (emphasis added):

> *Daubert* left open the question of how courts should evaluate expert testimony from areas other than science. The four factors it discussed — testing, peer review, error rate and standards, and general acceptance — were intended to guide trial judges in assessing the validity of the reasoning and methodology used by scientific experts.
>
> For most courts asking if *Daubert* "applies" involves the tacit assumption that if *Daubert* does apply, then the expert's testimony will rise or fall on whether the expert can answer the Four "Magic" Questions: has the method been tested?, has it been subjected to peer review?, is there a reasonably low rate of error?, and does it find general acceptance in the scientific community? Conversely, if *Daubert* does not "apply" then the court need not ask the Four Questions, and the testimony automatically comes in. . . .
>
> The shortcomings of this method of analysis are apparent. Such an analysis misreads *Daubert* when it treats the question, "Does *Daubert* apply?" as shorthand for application of the Four Questions. Although such a superficial analysis might be simple for litigants and judges to apply, it overlooks that fact that the Supreme Court itself took pains to point out that it did not intend to "presume to set out a definitive checklist or test" and instead described the Four

> Questions as "general observations." . . . The Four questions were merely the principal hallmarks of good science. . . .
>
> The problem is this: When one ventures outside the laboratory into the realm of engineering or other technical disciplines, one or more of the Four Questions may not fit as well as they do in the laboratory. And if the Four Questions do not fit, what if any other questions should be posed in their stead? . . .
>
> A highly qualified real estate appraiser follows religiously the MAI appraisal techniques adopted by her profession, but has not performed a test. Does it make sense to ask why the opinion has not been tested? Probably not.
>
> The key to applying *Daubert* in a meaningful and principled way to these cases is . . . to identify the functional equivalent to the Four Questions used by experts in the particular field of expertise in which the expert proposes to testify. This will allow the court to understand how experts in the particular field test reliability in their profession outside the courtroom. The goal should be to ensure that the expert "'adheres to the same standards of intellectual rigor that are demanded in [her] professional work.'" [quoting *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996)] In many of the technical or nonscientific professions, processes analogous but not identical to the scientific method have evolved. The methodologies of these professions are often informed by the methodologies of science and, as we shall see, offer objective guideposts to ascertaining evidentiary reliability and helpfulness of expert testimony proffered in these fields.

> The goal should be to assure that the techniques and methodologies used by experts in the particular field in rendering an opinion for court testimony are the same as those which an expert in the field would use in reaching a professional opinion outside the courtroom. . . .
>
> In many cases, of course, there will be no published standards, and even when there are, they may not be relevant to the issues raised in litigation. . . . Whatever the source of information, however, Rule 702 necessarily requires that a witness' testimony reflect the methods and practices of the field of expertise at issue.

Most of the lower courts have agreed generally with the core concept advocated herein by AIEG, though not all of them have clearly articulated that the criteria for judicial "reliability" is the methodology actually used in the particular field of expertise. *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998), does explicitly understand that courts do not make "a priori judgments about how scientific inquiry should be conducted;" but that each profession works out for itself methodologies deemed trustworthy for that field. *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (2nd Cir. 1994), reversed the exclusion of an expert because the expert used the "type of methodology and data typically used and accepted in construction-litigation cases. . . ." Cases like *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), cert. denied, 117 S.Ct. 611 (1996), and *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997), have held that the *Daubert* factors are inapplicable, though not specifically stating what criteria of reliability would be applicable to technical or experience-based testimony of engineers. The following district court opinion is an example of the reasoning advocated herein by AIEG:

> If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, then so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under *Daubert*. The inquiry is case specific. . . . The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses, and methods relied on by experts in his field, and the information that he gathers must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then rigid compliance with *Daubert* is not necessary.

Tassin v. Sears, Roebuck & Co., 946 F.Supp. 1241, 1247-48 (M.D. La. 1996) (emphasis added).

This amicus is in general agreement with the ideas expressed in Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699 (1998), and AIEG highly recommends Prof. Capra's article to the Court. The gist of Prof. Capra's opinion is, as follows:

> All that *Daubert* requires is that the expert's conclusion must rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions.
>
> . . . .
>
> The expert must select a methodology that is sufficiently related to the subject matter of the specific case involved.

. . . .

[A]n expert's testimony will be admissible if she employs the same methodology in reaching her conclusion as she would employ in her professional work in the real world. If the methodology is good enough for the real world, it is good enough for a trial. On the other hand, if the methodology is altered for the purposes of litigation, there is good reason to exclude it after *Daubert*. As Judge Posner has put it, the object of *Daubert* is to assure that "experts adhere to the same standards of intellectual rigor that are demanded in their professional work." [quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)]

. . . .

If the expert employs an objective methodology that is substantially similar to that which he employs in his professional work, a court is likely to find his testimony admissible. Any problems with such testimony will instead be relevant to weight.

. . . .

In most areas of nonscientific expert testimony, such as accountancy or evaluation of customary industry practices, well-accepted practices and methodologies are used. If the expert follows these accepted practices and methodologies and explains how she has done so, then the testimony should be found admissible without regard to the specific factors listed by the Court in *Daubert*. . . .

[T]he "controversy" over whether *Daubert* applies beyond hard science is highly overstated. The courts agree that *Daubert* governs all expert testimony, at least in the general sense that the trial court must scrutinize the reliability of all expert testimony. There is also agreement that

> an assessment of reliability must vary according to the type of testimony proffered. Some expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication. Other types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.

Id. at 730-31, 735, 738, 742, 745.

The position advocated herein by AIEG was cogently stated in a recent American Bar Association newsletter. See David W. Holman, *Of Bumblebees and Street Gangs: The Limited Scope of Daubert*, Tort and Insurance Practice Section Committee News 9, 11-12 (Summer 1998):

> In our day-to-day lives, we rely on the opinion of experts whose knowledge does not arise from the scientific method, but from experience. . . .
>
> The list of experts who do not derive their knowledge from the scientific method, is almost too numerous to mention: accountants, attorneys, business persons, bankers, investment advisers, police, funeral directors, property appraisers, car salespeople, car mechanics, musicians, farmers, historians, carpenters, security guards, skeet shooters, and so forth. We do not ask that the opinions of those "experts" be "objectively valid" or capable of empirical testing. We only ask that the opinion be the expert's best judgment based on the expert's experience. . . .
>
> So long as the expert's testimony is based on experience gained thorough firsthand knowledge or on a review of data "of the type reasonably relied upon by experts in the particular field," [quoting advisory committee note to Fed.

R. Evid. 703] the nonscientific expert's testimony should be admissible. . . .

To those who would contend that our courts need to establish "reliability" thresholds for the admissibility of nonscientific expert testimony, the contention states a false problem with no workable solution.

First, opinions of nonscientific experts do not present the kind of "junk science" problem that *Daubert* was meant to address. Rather, nonscientific expert testimony is evidence that is typically used to assist a jury in resolution of a fact in issue. To apply the rigorous *Daubert* analysis to such experts — whose expertise is derived from practical experience rather than experimentation and testing — would unnecessarily exclude otherwise relevant and reliable expert testimony from the jury. . . .

Second, there are no workable solutions for establishing "reliability" thresholds for every expert discipline. While the *Daubert* factor analysis has merit in establishing criteria for the "objective validity" of a pure scientific discipline, there are no objective criterion for determining the "objective validity" of a lawyer's testimony about the standard of care, or a gang member's opinion about the meaning of a gang's code words, or a beekeeper's opinion about the behavior of bumblebees. There is no definition of "reliability" that can apply to all opinions from nonscientific disciplines.

Finally, the alleged problem is not without a solution. The trial court's role as a "gatekeeper" for scientific expert testimony in *Daubert* "was not intended as a replacement for the adversary system." [quoting *Unitd States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)] The

fact that a nonscientific expert's testimony is admissible does not preclude a party from challenging the reliability of the admitted evidence. With a nonscientific expert, cross-examination and impeachment "can be as rigorous as any 'peer review' process." [quoting *Markum v. Westview Instruments, Inc.*, 52 F.3d 967, 1006 (Fed. Cir. 1995)]

As the Supreme Court said in *Daubert*:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. [509 U.S. at 596]
>
> . . . .
>
> The wisdom of our system of jurisprudence is to allow truth to be tested in the crucible of the adversary process and to be forged by a jury of our peers. To impose arbitrary scientific analysis on this system serves only to restrict our search for truth and to limit our capacity for justice.

Although attempting to couch the issue as one of "discretion," Petitioners and their amici basically seek to apply the *Daubert* factors as the test of reliability for every expert witness. This approach is incompatible with this Court's acknowledgment in *Daubert* that the five factors were general observations that must be flexibly applied. Petitioners' approach would exclude much reliable and relevant expert testimony from being heard by juries (and often resulting in procedurally unfair summary judgments or judgments as a matter of law).

Civil cases are decided on a preponderance of the evidence. A jury can be 49% uncertain and still properly return a plaintiff's verdict. There are significant conceptual differences between "science" and "jurisprudence"

that are reflected in the difference in the nature of the decision-making process that obtains within each of the two disciplines. Judicial decisions in our society, and in the history of our jurisprudence, are not required to approach the degree of certainty utilized in the hard sciences in university laboratories. There is no policy reason why courts should hold expert witnesses to standards higher than their own profession maintains for the bases of day-to-day professional decision making.

The rigid approach urged by Petitioners sets an unreasonably high standard for admission of non-pure-science expert testimony. The financial costs of a rigid compliance with the *Daubert* factors would close the courthouse door to most product liability plaintiffs. "[T]esting should not be an absolute requirement to the admissibility of expert testimony. The expense of litigation must be taken into account. If a design engineer testifies that a car could have been designed more safely, the court should not exclude the testimony out of hand simply because the expert has not himself built a car employing the alternative design." Capra, supra, at 32 Ga. L. Rev. 729. Moreover, Petitioners' approach raises grave constitutional concerns:

> In other words, the experts provided enough objective factors to indicate that they were not speculating, and they employed a methodology that was basically the same as what they ordinarily employed in their professional lives. That showing is all that *Daubert* should be held to require. If the *Daubert* threshold is struck higher than that, plaintiffs would be unfairly deprived of a jury trial, and the prosecution would suffer an undue burden in criminal cases.

Id. at 736. See generally, Avi Lew, *Preliminary Screening Hearings in Product Liability Litigation: Trampling on the Fundamental Constitutional Right to Trial by Jury*, 16 J. Prod. & Toxics Liab. 37 (1994).

A full-blown application of all of the *Daubert* factors to cases involving a defect in a mechanical product will necessarily increase the burden of discovery on defendant manufacturers. The best way to meet the criteria suggested by the Petitioners is to have the plaintiff's expert base his testimony on the same grounds on which the defendant's employees and/or expert witnesses base their testimony. Much of this information — indeed, in same cases, all of this information — is exclusively in the defendant manufacturer's possession. Many courts have discussed the significance of the fact that vital documents are exclusively in the possession of one of the parties and can only be acquired by discovery.[3] Adoption of the rule suggested by Petitioners would compel plaintiffs to conduct aggressive discovery and would compel courts to consistently employ a broad construction of discovery to compel full disclosure of information from the manufacturer defendant. Pages 14-15 of the amicus brief filed by John Allen, et al., in support of Petitioners, implicitly recognizes this heightened need for even more discovery. In addressing how one party can use its expert to launch a *Daubert* attack on the opposing expert, the amici note: "To perform this role effectively, however, the expert must understand fully the other side's testimony. What is true in academic research is equally true in the

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[3] *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D.Mass. 1976); *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496 (D.Conn. 1985); *King v. Georgia Power Co.*, 50 F.R.D. 134 (N.D. Ga. 1970); *Hess v. Pittsburgh Steel Foundry & Mach. Co.*, 49 F.R.D. 271, 273 (W.D. Penn. 1970); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 245-55 (N.M. 1980), *cert. denied*, 451 U.S. 901 (1981), *reh'g denied*, 452 U.S. 932 (1981). See also, Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure; Is It Time Again For Reform?*, 138 F.R.D. 155, 159 n.21 (1992); William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?* 74 JUDICATURE 178, 182 (1991).

courtroom: unavailability of the data, assumptions and methodologies explicitly or implicitly underlying an engineering expert's conclusions deprives other engineers of the ability to test, analyze, replicate, or falsify the conclusions."

In attempt to win their desired goal, Petitioners and their amici set up a false "straw man" to attack.[4] They assert that, if the *Daubert* factors do not apply to all experts, trial courts will automatically admit the testimony of experts who purport to fall outside the realm of pure science. This "straw man" argument is false. AIEG, and the vast majority of scholarly articles and judicial opinions, recognize that all challenged expert testimony must be found by the court to be "reliable" in order to be admissible. AIEG is not aware of anyone who contends for the automatic admission of non-scientific expert testimony. Again, the appropriate issue in this case is what criteria of reliability should be used to assess the reliability of experts outside the novel, pure science at issue in

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[4] See, as examples: the Product Liability brief, at 3 ("Affirmance of the Court of Appeals' judgment would lead to an absurd result: experts ... who disregard the rigors of science would pass through the gate without scrutiny."); the Rubber Manufacturers brief, at 12 ("The Eleventh Circuit's holding would permit a licensed physician, or even a witchdoctor, to testify about what caused a plaintiff's illness based solely on a lifetime observing sick people."); and, the Automobile Manufacturers brief, at 29 (suggesting that the Eleventh Circuit has adopted a 'let-it-all-in' rule simply because the witness offers subjective assurances that his personal 'experience' supports his personal 'net opinion.'"), and, at 20 ("However, if an expert forgoes reliance on any established technique or methodology but, instead, injects his own personal opinions, no matter how unrealistic, then trustworthiness criteria are unnecessary."). Petitioners' brief, at 28, states that the Eleventh Circuit's "approach, we submit, would eviscerate Rule 702 because it would allow experts to avoid scrutiny under *Daubert* simply by claiming to be testifying based on their experience."

Daubert? The appropriate answer is very simple: the trial court should make sure that expert opinion testimony is derived by the same methodology demanded of the expert in his or her field in the expert's day-to-day professional work.

II. SUGGESTED ENGINEERING CRITERIA

AIEG urges that the holding of this case be that the applicable criteria for a Rule 702 reliability analysis be the criteria or methodologies utilized by the expert witness's own profession or field of expertise. Unless the parties agree on the issue of what methodologies are appropriate, the question of what a particular profession actually does (what methods it uses) will be a fact issue for the trial court to resolve. This Court need go no further in its opinion in this case.

The court should consider that most expert witnesses come from fields that already have well-defined standards and methods. This means that most reliability issues can be easily managed by the trial court without the need for one standard, rigid legal test applicable to all kinds of experts. See Hoffman, supra, at 739-40:

> Historians, economists, psychologists, accountants, appraisers, fire investigators, and other specialists in technical nonscientific fields have continued to adapt the scientific method to shape the advances in their particular disciplines. Though experts in these fields almost never perform laboratory experiments, they have developed corollary methodologies to ensure the reliability of their work.
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> . . . .
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> Such wide-ranging technical fields as accounting, engineering, fire investigation, appraisal, and the like . . . have developed methods of peer review and have published methodological

standards. These standards of professional societies are often developed and published through a process of peer review and have been tested in the crucible of experience by multitudes of professionals outside the litigation arena. In this way, like the processes encouraged by the Supreme Court in *Daubert*, these published standards provide a blueprint which, if followed, assure both validity and reliability. Such standards are therefore capable of providing very clear guidelines that can be used to help gauge the validity of expert testimony in a particular field. ASTM (formerly the American Society for Testing of Materials) publishes standard methods and practices for conducting a wide variety of engineering tests, and for the design of different kinds of products and systems. The Society of Automotive Engineers also publishes various methods and design standards. So do numerous other organizations or institutions, including regulatory agencies. The Environmental Protection Agency, for example, publishes standard methods for environmental sampling and testing.

Other examples of standard practices include the Generally Accepted Accounting Principles for accountants, and the National Fire Protection Association's procedures for fire investigators. Indeed, guidance on what constitutes valid expertise is available for many fields.

. . . .

Perhaps the unifying, if unspoken, thread of these cases is that the courts used Rule 702 to ensure that expert testimony offered in court was derived by the same methodology and with the same amount of intellectual rigor demanded of experts in the same field in their professional work. As we have seen, professionals in many non-scientific fields have developed standards and methodologies for their work; the court can ensure the validity of the expert's methodology under Rule 702 by reference to those standards.

Mindful that adoption of the appropriate criteria is to a large extent governed by the question that the expert is being asked, AIEG suggests the following factors are appropriate for the court to employ in verifying the reliability of the testimony of a civil engineer who is seeking to identify a defect in a mechanical product and to establish its causal relation to an injury. It is important to note that AIEG does not proffer these factors as exclusive or wholly comprehensive. As the Court noted in *Daubert*, such factors are not intended for rigid or inflexible application. Indeed, not all of these factors apply in every case. To reason by analogy, these factors are like tools in a carpenter's box — selection of the right tool depends on the needs and demands of the particular job. The following factors also illustrate that there is a perfectly valid approach to the determination of reliability of expert testimony that does not require a rigid application of the *Daubert* factors.

First: Facts of the incident (including performance of the product and conduct of plaintiff and others).

Second: Physical examination/study of the scene and the product (including the use of photographs or videotape).

Third: Facts concerning the use and condition of the product prior to the occurrence of the incidence.

Fourth: Information concerning the design and construction of the product.

Fifth: Information concerning the performance of other similar products (i.e., products possessing the same conditions) in the real world environment of use.

Sixth: Application of the principles of deductive analysis:

A. Failure of the suspect condition and injury causation; and,

B. Exclusion of other likely explanations for injury causation.

[The sixth factor is sometimes called "Failure Analysis," and involves the techniques of Failure Mode and Effect Analysis (FMEA). This factor involves the application of established principles of science and the specialized knowledge of the expert.]

Defendant manufacturers themselves (including employees and expert witnesses) employ these factors. Several of the *Daubert* factors are irrelevant to this approach: e.g., (1) duplicative testing; (2) peer review and publication; and (3) determination of the statistical rate of error. Two *Daubert* factors are embraced by this criteria: (1) the *Daubert* factor of standards and controls is embraced in the fourth, fifth, and sixth factors above; and (2) the *Daubert* factor of general acceptance is embraced in the sixth factor listed. Indeed, the use of this criteria to verify reliability is generally accepted in this community of professionals (i.e., engineers seeking to identify a defect in a mechanical product). AIEG's point is this: the rejection of a rigid application of the *Daubert* factors to all kinds of expert testimony does not mean that such testimony will automatically be admitted. Under the holding proposed by AIEG, trial courts will still operate as "gatekeepers" to exclude unreliable testimony.

III. THIS AMICUS'S PROCEDURAL CONCERNS

Just as the majority opinion in *Daubert* offered some "general observations" for the benefit of the bench and bar, the Justices may desire to establish some general guidelines regarding the procedure of "*Daubert* challenges." There currently is no uniformity or procedural guidelines. See Holman, supra, at 12 n. 6:

> Many procedural questions have been raised about the utility of the *Daubert/Robinson* test in our overburdened courts — such as the placement of the burden of proof, the standard of review, the extent of the "mini-trial," and so forth. Numerous examples have been reported of five and six day hearings with review of voluminous exhibits and briefs merely to determine the "admissibility" of a qualified expert. See e.g., Lisa M. Agrimonti, *The Limitations of Daubert and its Misapplication to Quasi-Scientific Experts, a Two Year Case Review of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 Washburn L.J. 134, 135 n. 7 (Fall 1995), Timothy B. Dyk and Gregory A. Castanies, "*Daubert Doesn't End Debate on Experts*," 15 Nat'l L. J. 18 (Aug. 2, 1993).

The *Daubert* opinion suggested that trial judges conduct "a preliminary assessment" of the reasoning of the expert's testimony, 509 U.S. at 593, but the Court did not explain any further how this procedural goal should be reached. See the FJC's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE §I.C., p. 49 (West ed. 1994):

> The *Daubert* opinion did not address many of the complex issues that will have to be elucidated in order to reconcile the Supreme Court's recognition of the Federal Rules' liberal admissibility policy for expert proof with its endorsement of the trial judge's gatekeeping function. Many of these issues raise procedural con-

> cerns that were not dealt with by the Court. In the future, courts will have to examine the interrelationship of discovery rules and *Daubert*, the nature of judicial screening pursuant to Rule 104(a), and the interplay between issues of admissibility and sufficiency when expert testimony is challenged.

See also Fenner, supra, at 29 Creighton L. Rev. 984:

> The *Daubert* issue has been raised in motions in limine, motions to strike, and motions for summary judgment. The issue has been raised by a request for a pretrial Rule 104(a) hearing. It has been raised by objection during trial. If the jury is to be kept from hearing the expert's testimony, the objecting party's last chance is an objection during trial, perhaps coupled with a request to interrupt the direct examination and conduct a voir dire examination of the witness to establish that the witness is unqualified or that either the theory or methodology is unreliable or irrelevant. Of course, as everywhere else in the law of evidence, there must at least be a timely and specific objection. . . . The requirement for a timely and specific objection applies to *Daubert* testing.

It is probably not possible or appropriate to attempt to address all known procedural concerns in dicta in one opinion. However, it would greatly aid the bench and bar if the Court would offer some "general observations" on some of the most critical procedural issues.

First, must the trial court always engage in a *Daubert* analysis? Most courts have followed the approach advocated by AIEG and have refused to engage, sua sponte, in the issue, but have required a litigant to raise the issue. See generally Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994).

There is no need to waste scarce judicial resources on non-issues. AIEG urges that a *Daubert* inquiry is not necessary unless and until an opposing party successfully initiates some form of a challenge to the expert's reliability.

Second, and most importantly, AIEG urges that both the burden of going forward (raising the issue) and the ultimate burden of persuasion (burden of proof) to exclude an expert should rest with the objecting or challenging party. This should logically be the rule because "Federal Rules 702 and 403 are written in terms of a presumption of admissibility." Capra, supra, at 32 Ga. L. Rev. 703. "The Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact. Rule 702, which governs the admissibility of expert testimony, has a liberal policy of admission." *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3rd Cir. 1997) (internal citations omitted). See also 29 Charles Alan Wright and Victor James Gold, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §6262, pp. 184-86 (1997):

> Importantly, however, Rule 702 on its face creates no general power in the trial judge to exclude expert testimony on the grounds it is unreliable. This reflects basic policies of the Evidence Rules in several respects. First, it is typical of the Rules' liberal approach toward admissibility to limit the gatekeeping powers of the trial judge. This philosophy is strongly represented in Article VII. Second, the absence of a reliability requirement for admission affirms that the power to evaluate the credibility of witnesses and give testimony its proper weight primarily resides with the trier of fact. Finally, reposing such power in the jury rather than the judge is consistent with an assumption made throughout Articles Vi and VII of the Evidence Rules: juries generally have the ability to accurately

> weigh evidence and evaluate witness credibility. Thus, the absence of a reliability requirement in Rule 702 reflects the conclusion that, assuming the terms of the provision are otherwise met, accurate factfinding usually is promoted by letting the trier of fact hear expert testimony. Accordingly, the most common judicial response to attacks on the reliability of expert testimony is that such matters go to weight, not admissibility.
>
> This faith in the ability of juries is itself premised upon the assumption that our adversary system usually is capable of revealing and making understandable trustworthiness problems that are not otherwise obvious to a layperson. This assumption is central to the rules regulating expert witness testimony.

Because proffered expert testimony is presumed to be admissible, the burden of proof logically falls on the objecting party to prove that the expert is "unreliable," within the meaning of Fed. R. Evid. 702 and *Daubert* and its progeny.[5]

Third, when should the *Daubert* challenge occur? The earlier, the better. The Court may need to delay the ultimate ruling until it has sufficient knowledge; but the challenge, in fairness, should be made at the earliest possible moment. See Fenner, supra, at 29 Creighton L. Rev. 957:

> An early Rule 104(a) hearing can educate the judge regarding the special vocabulary of the science before the court. And it gives the judge this education in advance, before the evidence

[5]The net effect of the positions taken by Petitioners and their amici would be to make a major policy shift in the Rules of Evidence: away from a principle of inclusion and to a presumption of exclusion.

> starts coming in. It allows the judge to approach the evidence from the very beginning with a background in the language being used.
>
> An early hearing is more cost effective on both sides. In general, having these issues resolved prior to trial, on the record, is a great help to plaintiffs and defendants, saving both time and money.
>
> In a jury case, an early hearing will generally lead to better utilization of the jury. If the jury must leave the room when the judge takes the information needed to make this decision, then the pretrial hearing will allow the judge to make the decision before the jury is even empaneled.

There can be no dispute but that the adverse effects of the *Daubert* opinion (having one's expert declared inadmissible) have fallen primarily on plaintiffs in civil cases. The timing of the trial court's exclusion order can have a particularly punishing and pernicious effect.

If the ruling is made during trial, and plaintiff has no other expert on that necessary element of the claim, plaintiff will suffer judgment as matter of law. If the ruling is made as a part of a motion for summary judgment, plaintiff can similarly suffer an irrevocable judgment as a matter of law, with no chance to "cure" the reliability deficiency found to exist by the trial judge. Furthermore, if a pretrial motion to exclude is filed by defendant after the deadlines in the scheduling order have passed for designating new experts or conducting additional discovery, the plaintiff will still necessarily suffer judgment as matter of law.

In addition to urging the raising of *Daubert* issues at the first possible moment, this Court should encourage trial courts to create a time period for a party to "cure" the reliability deficiencies or to retain new expert witnesses.

A litigant cannot know in advance what the judge's ruling will be. If the trial court excludes the only expert on a necessary element of the claim, procedural fairness demands there be reasonable time to react to the ruling in attempt to "cure" (unless the losing party has already been guilty of some sort of inexcusable procedural delay in regard to the *Daubert* issue or in regard to the expert witnesses in the case).

In light of the above arguments, AIEG suggests that the admission of expert testimony involves a three-step process:

Step One: Burden On The Party That Proffers The Testimony

- Threshold Showing:
  1) Qualifications
  2) Relevance
  3) Aid to the jury

Step Two: Burden On The Objecting Party

- Must Clearly and Specifically Show How Reliability Of Testimony Is Actually "Suspect"
- Burden Cannot Be Carried Pro Forma, or By Attorney Conclusions
- Burden Requires Objecting Party to Point Out With Clarity The Precise Reason For Which Reliability Is Suspect

Step Three: Adjudication of Burden To Satisfy Applicable Factors

- Offering Party Responds to Objections
- Court Should Adopt and Apply Factors Ordinarily Employed By Members Of Profession

CONCLUSION

AIEG urges that the Eleventh Circuit be affirmed. The essential holding of the Eleventh Circuit is that the *Daubert* factors are not relevant as the test of Rule 702 reliability in this particular case, but that the district court must perform an appropriate reliability "gatekeeper" screening. This Court's comments in its opinion in this case will aid the district court in that process.

Respectfully submitted,

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